



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2014-179

v.

NJ Office of Information Technology
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant’s January 9, 2014 OPRA request, which sought budgets and budget submissions. See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto* as containing advisory, consultative, or deliberative material, and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian’s assertions. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant’s January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant’s January 16, 2014 OPRA



request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records identified in Paragraph No. 2, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 25, 2015

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2014-179

v.

**NJ Office of Information Technology²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

January 9, 2014 OPRA Request³

1. Copies of all correspondence including e-mails and reports assessing the costs of current [Office of Information Technology (“OIT”)] print operation & expected future costs.
2. Annual budgets and budget submissions concerning in whole or part OIT HUB print operations for 2013, 2014, and 2015.

January 16, 2014 OPRA Request

Studies of print privatization including reports on alternatives to privatization prepared by Elliot Lynn, Hagen Hottmann, Michael Haberstick and other OIT managers.

Custodian of Record: Shelley Bates

Request Received by Custodian: January 9, 2014; January 16, 2014

Response Made by Custodian: February 21, 2014; March 27, 2014; April 4, 2014; April 16, 2014; June 27, 2014; July 11, 2014

GRC Complaint Received: April 24, 2014

Background⁴

Request and Response:

On January 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ Annemarie Pinarski, Esq. of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by Schenk, Price, Smith, & King, LLP (Florham Park, NJ).

³ The Complainant requested other records, but they are not at issue in this matter.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

request to the Custodian seeking the records identified as Item Nos. 1 and 2. On January 16, 2014, the Complainant submitted a supplemental OPRA request to the Custodian seeking the records identified above. On February 19, 2014, counsel for the Complainant sent a letter to the Custodian stating that the Complainant has not received a response. Counsel further stated that the Custodian should produce responsive records by February 21, 2014 to avoid a filing of a Denial of Access Complaint or lawsuit in New Jersey Superior Court.

On February 21, 2014, twenty-nine (29) business days after receiving the Complainant's January 9, 2014 OPRA request, and twenty-three (23) business days after receiving the Complainant's January 16, 2014 OPRA request, the Custodian responded in writing, partially producing responsive records. However, for the items at issue, the Custodian sought an additional seven (7) business days to respond.

On March 27, 2014, the Custodian submitted an additional response to the Complainant's OPRA requests, providing partial responses to requested Item No. 1 and his January 16, 2014 OPRA request. The Complainant requested an additional six (6) business days to provide a complete response to Item Nos. 1 and 2, as well as the January 16, 2014 OPRA request.

On April 4, 2014, the Custodian responded further to the Complainant's OPRA requests, denying access to documents responsive requested Item No. 1 as containing inter-agency or intra-agency advisory, consultative, or deliberative material ("ACD"), and /or information which, if released, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. The Custodian also stated that there were no responsive records to Item No. 2, and that all responsive records to the Complainant's January 16, 2014 OPRA request were provided on March 27, 2014.

The Complainant replied to the Custodian on April 7, 2014, stating that the record the Custodian claimed as responsive to the January 16, 2014 OPRA request pertains to a study of potential privatization of print operations for the State of Connecticut and not studies prepared by the individuals identified in the Complainant's request. Further, the Complainant challenged the Custodian's assertion that no responsive records exist regarding budgetary information for state agencies. The Custodian responded later that day advising the Complainant to forward any questions he has to the Government Records Council ("GRC").

On April 16, 2014, the Custodian e-mailed the Complainant, restating that there are no additional responsive records to the January 16, 2014 OPRA request. The Custodian added that the Complainant's request for budgets of the "OIT HUB print operations" is not the same as requesting the budget for an entire state agency. The Custodian included Internet links to OIT's annual budget for FY 2013, 2014, and 2015 as responsive to the request.

Denial of Access Complaint:

On April 24, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that his e-mail dated April 4, 2014 conveys his arguments against the Custodian's denial of access to requested Item No. 2 and the January 16, 2014 OPRA request. The Complainant also contested the assertion that responsive records to Item No. 1 would contain ACD material or would give an advantage to competitors or bidders if disclosed.

The Complainant further contended that the Custodian's fragmentary responses and significant delays demonstrated a willful denial of access.

Statement of Information:

On August 15, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she did not willfully deny access to the requested records, and that any denial of access was lawful.⁵

January 9, 2014 OPRA Request Item No. 1

The Custodian certified that at the time the Complainant submitted his January 9, 2014 OPRA request, OIT was preparing a Request for Proposal ("RFP") regarding printing operations at its HUB location. The Custodian certified that responsive records to Item No. 1 contain ACD material, including the procedural details on the RFP's creation, as well as opinions and comments of personnel in charge thereof.

Additionally, the Custodian certified that responsive records also contain data essential in determining the RFP's terms. According to the Custodian, such data included the page rate cost, the cost of moving printing operations, and overall cost analysis. The Custodian asserted that revealing such data would give an advantage to anyone interested in the award under the RFP.

January 9, 2014 OPRA Request Item No. 2

The Custodian certified that OIT does not possess records constituting a separate budget for printing operations at its HUB location. The Custodian contended that such costs are captured under various line items within OIT's overall budget, which in turn becomes part of the State of New Jersey's budget. Therefore, the Custodian certified no responsive records exist for Item No. 2.

January 16, 2014 OPRA Request

On June 27, 2014, the Custodian submitted a letter to the Complainant, stating that she located one (1) additional responsive document to his January 16, 2014 request. The Custodian also requested clarification on the phrase "[s]tudies of print privatization" in the Complainant's request. The Custodian stated that the RFP on printing services do not refer to privatization.

That same day, the Complainant responded to the Custodian, stating that he is requesting "studies . . . concerning the print operations envisioned in the RFP . . . [as] well as studies . . . that explore alternatives to the contracting of print operations envisioned in the RFP."

⁵ The Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

On July 11, 2014, the Custodian responded to the Complainant, stating that an additional review failed to produce any other responsive documents to his January 16, 2014 request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

OPRA also provides that:

Immediate access ordinarily shall be granted to *budgets*, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. (Emphasis added.)

N.J.S.A. 47:1A-5(e).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant[.]" Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In the instant matter, the Custodian acknowledged that she received the Complainant's first (1st) OPRA request on January 9, 2014, and his second (2nd) OPRA request on January 16, 2014. The Custodian also certified that she partially responded to both requests on February 21, 2014, twenty-nine (29) and twenty-three (23) business days later, respectively. Moreover, requested Item No. 2 of the Complainant's January 9, 2014 request sought the "budgets and budget submissions" for OIT's printing operations for the years 2013, 2014, and 2015.

⁶ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant's January 9, 2014 OPRA request which sought budgets and budget submissions. See Herron, GRC No. 2006-178.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

January 9, 2014 OPRA Request Item No. 1

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁷ in which the GRC dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The court stated that:

OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

Id. at 354.

The court also stated that:

[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Further, the court stated that:

[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian asserted that responsive records to requested Item No. 1 were withheld from disclosure on the basis that they contain ACD material, and/or would give a an unfair advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1.

Therefore, the GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto*, as containing ACD material and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian's assertions. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

January 9, 2014 OPRA Request Item No. 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that OIT does not create or maintain a budget specifically regarding printing operations at its HUB location. The Custodian further stated that budget information related to printing operations are captured within other fiscal number which comprise OIT's overall budget, which in turn is made public during the State of New Jersey's budget process. The Complainant has failed to provide evidence to rebut the Custodian's certification.

Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant's January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC No. 2005-49.

January 16, 2014 OPRA Request

As referenced above, Pusterhofer provides a custodian cannot unlawfully deny access to records that do not exist. GRC No. 2005-49. Here, the Custodian certified that no additional responsive records to the Complainant's January 16, 2014 OPRA request exist, beyond what was provided to the Complainant on March 27, 2014 and June 27, 2014. Furthermore, the Complainant has failed to provide any evidence to rebut the Custodian certification.

Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's January 16, 2014 OPRA request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC No. 2005-49.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant's January 9, 2014 OPRA request, which sought budgets and budget submissions. *See Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007).
2. The GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto* as containing advisory, consultative, or deliberative material, and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian's assertions. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant's January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof

that she did not unlawfully deny access to the Complainant's January 16, 2014 OPRA request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

5. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records identified in Paragraph No. 2, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."